be admitted indirectly. As a general rule opinion evidence is excluded only when superfluous.[4] If separate occurrences cannot be adequately presented to the jury, or if they are such that jurymen would not have the technical knowledge necessary to draw a correct inference, a witness better qualified to deal with the question may state his conclusion.[5] And as a general rule he is allowed to state the facts on which this conclusion is based.[6] This same reasoning applies also to individual conduct, where numerous occurrences under similar conditions constitute a custom.[7] In a late Wisconsin case, to prove the plaintiff's due care, evidence of the existence of a general railroad custom for switchmen in the yards to ride on the side of freight cars was admitted. *Boyce* v. *Wilbur Lumber Co.*, 97 N. W. Rep. 563. Clearly this could be admitted only as an opinion, for whether a custom exists is nothing but a conclusion of the witness from numerous individual instances within his knowledge, which he might have been allowed to state to show the reasons for that conclusion. Accordingly, whenever individual instances, otherwise admissible, are sought to be excluded on the ground that multiplicity prevents an adequate presentation to the jury, that very ground makes admissible an opinion which possesses all the probative value of separate occurrences and may be used to indirectly introduce the occurrences themselves.

COUNTERCLAIM AND THE JURISDICTIONAL LIMITS OF COURTS. — By a statute almost universal in the United States, the right is conferred on the defendant in any action at law to counterclaim any right he may have against the plaintiff and recover the amount that his claim exceeds the latter's. The broad language of these statutes raises an interesting question when the defendant's counterclaim is greater in amount than the jurisdictional limit of the court in which the plaintiff has brought his action. The courts in such cases have reached different results. A recent New York case holds that the court can take jurisdiction of the counterclaim and give judgment on the merits, though the amount far exceeds the jurisdictional limit of the court. *Howard Iron Works* v. *Buffalo, etc., Co.*, 176 N. Y. 1. Another view, held in South Carolina, is that by filing the counterclaim the defendant ousts the court of jurisdiction of the whole matter.[1] The majority of the courts, however, hold that in such cases the defendant cannot file his counterclaim, but must sue it out in the proper court as a separate action.[2]

A counterclaim is a separate cause of action, which the defendant is authorized to litigate in the same action with the plaintiff's claim.[3] To allow the defendant to recover on his counterclaim a greater amount than the court is allowed to try in a direct action is to strike at the foundations of jurisdictional limitations on lower courts. By such a rule it becomes

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[4] Greenl. Ev., 16th ed., § 441 b.

[5] *Cf.* Cornell *v.* Green, 10 S. & R. (Pa.) 14, 16; Commonwealth *v.* Sturtevant, 117 Mass. 122; Hardy *v.* Merrill, 56 N. H. 227, 241.

[6] Dickenson *v.* Inhabitants of Fitchburg, 13 Gray (Mass.) 546, 555; Kostelecky *v.* Scherhart, 99 Ia. 120.

[7] Cass *v.* Boston & Lowell R. R. Co., 14 Allen (Mass.) 448; Grand Trunk R. R. Co. *v.* Richardson, *supra.*

[1] See Haygood *v.* Boney, 43 S. C. 63.

[2] Griswold *v.* Pieratt, 110 Cal. 259; Almeida *v.* Sigerson, 20 Mo. 497.

[3] Standley *v.* Northwestern, etc., Co., 95 Ind. 254.

possible for courts regarded as competent to try only the very smallest cases, to usurp the jurisdiction of the highest court. By the rule of the principal case jurisdictional limits would be set at naught by a provision having no direct bearing on them. On the other hand the plaintiff has a right to sue in these lower courts if he has a proper claim. The fact that by doing so the defendant will not be able to secure certain extraordinary relief he might otherwise have, does not seem sufficient ground for holding as is done in South Carolina, that the defendant may throw the plaintiff out of court. As a question at law, then, the view taken by the majority of the courts seems sound. The plaintiff has a right to sue in this court, and the defendant cannot avail himself of the general right to counterclaim because he cannot bring his cause of action within the proper limits.

As, however, the defendant, merely because of the size of his claim, is deprived of substantial relief at law to which he would otherwise be entitled, on the analogy of certain other cases, he should have relief in equity. If a defense ordinarily available at law cannot under the peculiar circumstances of a case be used, equity will enjoin execution of the judgment.[4] So in these cases the defendant ought to be allowed an injunction against the execution of the plaintiff's judgment till, proceeding with due diligence, he can procure his judgment to set off against the plaintiff's. If necessary equity might well go farther, and not only enjoin execution of the plaintiff's judgment, but also bring the plaintiff into equity and set off his judgment against the defendant's claim. Where the plaintiff is insolvent and the defendant's claim cannot be set up against him at law, this relief is commonly granted.[5]

DISCRIMINATION AGAINST NEGROES AS JURORS. — Few questions arising under the Fourteenth Amendment have proved more fruitful of controversy than that as to discrimination against negroes in drawing jurors. It is, indeed, no longer disputed that a statute providing that only white men shall be eligible as jurors is in conflict with the amendment. A negro tried by a jury empanelled under such a statute, or tried under an indictment found by a grand jury so drawn, is deprived of the "equal protection of the laws."[1] On the other hand, it is clear that a negro is not entitled to trial by a jury composed in whole or in part of members of his own race. All that is required is that no discrimination shall be made, in constituting the jury, on the ground of race.[2] Negroes and white men who have the same qualifications as to property, intelligence, and the like, must stand the same chance of being drawn as jurors.

The real dispute comes in the case in which a statute provides that public officers shall select from the whole body of citizens such as they think competent to act as jurors, the grand and petit juries to be drawn from among the persons so selected. Undoubtedly such a statute makes it easy to exclude negroes, disqualified in no respect except as to race, with little chance of detection. Yet the fact that this danger exists is not, in itself, a ground of objection. A negro cannot complain that he is deprived of his constitutional rights, unless he can prove that there was, in fact, discrimination on

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[4] Baltzell & Chapman *v.* Randolph, 9 Fla. 366.
[5] Hiner *v.* Newton, 30 Wis. 640.

[1] Strauder *v.* West Virginia, 100 U. S. 303; Neal *v.* Delaware, 103 U. S. 370.
[2] Virginia *v.* Rives, 100 U. S. 313.